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No. 78-1400

In the Supreme Court of the United States

OCTOBER TERM, 1978

COWLES BROADCASTING, INC. and COWLES COMMUNICATIONS, INC., PETITIONERS

v.

CENTRAL FLORIDA ENTERPRISES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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1. This case arises from a comparative hearing conducted by the Federal Communications Commission to consider two mutually exclusive applications to operate a television station in Daytona Beach, Florida. Petitioner, Cowles Broadcasting, Inc. (CBI), the current licensee, sought renewal of its license.[1] Respondent, Central Florida Enterprises, Inc. (Central), applied for a construction permit to build and operate a new station on the same channel. After weighing the advantages of preserving the incumbent's past proven services to the community against the possibility of

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[1]The other petitioner, Cowles Communications, Inc. (CCI), is the parent of the wholly owned subsidiary, CBI. CCI is also affiliated with various media interests in other parts of the United States (Pet. App. 180a).

increasing media diversification by granting the license to the challenger, the Commission concluded that the public interest would best be served by continuing the existing service.[2] It therefore granted CBI's application and denied that of Central (Pet. App. 140a-301a).[3]

2. The court of appeals reversed and remanded. It directed the Commission to reassess the question whether CBI possesses the minimum qualifications needed to retain the license.[4] It also concluded that the Commission had denied the challenger a fair comparative hearing by holding that an incumbent's "substantial" service record justifies renewal without due regard for traditional comparative criteria or, in the alternative, had improperly weighed "substantial" past performance "as a plus [factor] of major significance" in its comparative analysis (Pet. App. 36a-37a). Finally, the court concluded that the Commission had "seriously undercut the utility of the diversification criterion" by giving the benefits of diversification inadequate consideration in the present proceeding (*id.* at 28a).

The court of appeals subsequently amended its original opinion and issued a supplemental per curiam opinion (Pet. App. 39a-53a). The court acknowledged in its amended and supplemental opinions that

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[2]Before the Commission reached the issue of comparative benefits, it resolved certain preliminary qualifying issues in favor of CBI (Pet. App. 185a-270a).

[3]The Commission's decision affirmed in all pertinent respects the conclusions of the Administrative Law Judge (Pet. App. 54a-138a).

[4]The court held that the Commission must reconsider its finding that there was no connection between CBI and another CCI subsidiary that had been involved in a mail fraud scheme (Pet. App. 25a-26a). The court also directed the Commission to reassess its leniency toward CBI's unauthorized move of its main studio, in violation of a Commission rule (*id.* at 23a-25a).

Commission recognition of renewal expectancies stemming from an incumbent licensee's past record of "substantial" or "meritorious" service (as well as past "superior" service) is compatible with the full hearing requirement of Section 309(e) of the Communications Act of 1934, 47 U.S.C. 309(e) (Pet. App. 40a-43a, 48a-49a). The court further explained that in its former opinion it had objected only to the "manner" in which the Commission analyzed the diversification of media ownership issue, and had not intended to specify the weight that the Commission must attach to the goal of diversification in a comparative renewal hearing (*id.* at 43a).

3. The court's amended opinion properly revised portions of the initial opinion that, in our judgment, were erroneous. Although we still believe that the Commission's disposition of the comparative issues in this case should have been affirmed,[5] we understand the court's revised opinion, together with its supplemental per curiam opinion, as a directive to provide a more complete analysis, and not as a bar to the exercise of the discretion granted to the Commission under the Federal Communications Act.

The Commission, on remand, is neither denied its lawful discretion to determine what significance to attach to media diversification in the comparative renewal hearing, nor prohibited from taking into account the incumbent's meritorious past service record. A meritorious past record, the court pointed out, may afford the incumbent licensee a natural

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[5]In its petition for rehearing and suggestion for rehearing en banc, the Commission did not contest the court's remand of the mail fraud issue (Pet. App. 25a-26a). While the Commission did contest the remand of the unauthorized studio move issue (*id.* at 23a-25a), that issue, by itself, is not important enough to call for this Court's review.

advantage over the challenger in terms of predicting future performance because the challenger's "paper promises" of performance are often less credible (Pet. App. 40a). With respect to the question whether a past favorable record may be treated as a factor in the incumbent's favor, regardless of its predictive value, the court acknowledged that this result (urged by the Commission) at least appeared to be "plausible" under the public interest standard (*id.* at 48a-49a). Thus, the court left the Commission broad latitude to give appropriate weight to the renewal expectancies of the incumbent licensee (*id.* at 50a-51a). Review by this Court at this time is not necessary to permit the Commission to discharge its comparative renewal licensing responsibilities.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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